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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ARMANDO GARCIA, Plaintiff and Appellant, v. CITIMORTGAGE, INC., Defendant and Respondent.	E061120 (Super.Ct.No. CIVVS1102071) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. John P. Vander Feer, Donna G. Garza, Judges, and Kirtland L. Mahlum, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Law Office of Ronald R. Shea and Ronald R. Shea for Plaintiff and Appellant.

Akerman, Justin D. Balser and Robert R. Yap for Defendant and Respondent.

I. INTRODUCTION

Shortly after plaintiff and appellant Armando Garcia lost his Victorville home in an April 1, 2011, nonjudicial foreclosure sale, he sued several defendants, including his

mortgage lender, defendant and respondent Citimortgage, Inc. (Citi), and the successor servicer of his loan, Vericrest Financial, Inc. (Vericrest). This appeal concerns Garcia's claims against Citi.[1] In a separate appeal in case No. E058586, Garcia challenges the judgment dismissing his third amended complaint (TAC) against Vericrest, after the court sustained Vericrest's general demurrer to the TAC without leave to amend.

In the TAC, Garcia alleged causes of action against Vericrest and Citi for (1) wrongful foreclosure, (2) breach of contract, and (3) breach of the implied covenant of good faith and fair dealing. Citi obtained summary judgment on the TAC on the ground Garcia failed to tender the full amount due on his mortgage loan, at or before the time of the foreclosure sale. Garcia claims the summary judgment was erroneously granted. We conclude it was properly granted, but not because Garcia failed to tender the full amount of his mortgage loan. It was properly granted because Citi had no obligation to accept Garcia's March 1, 2011, loan payment; Citi notified Garcia, in advance, that it was transferring his loan effective March 1, 2011, and that all payments after February 28, 2011, had to be made to the new loan servicer, Vericrest; and Garcia did not make the March 1 payment to Citi or to Vericrest.

Garcia also challenges other court orders predating the order granting summary judgment in favor of Citi. He claims the court erroneously (1) sustained Citi's general demurrer to his fraud and negligent misrepresentation claims alleged in his second

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[1] In his notice of appeal, Garcia purported to appeal, not from the judgment in favor of Citi, but from each prejudgment order he challenges on this appeal. We have construed the notice of appeal as taken from the judgment.

amended complaint (SAC), without leave to amend, (2) struck all punitive damages allegations from the SAC, also without leave to amend, (3) denied his request for $2,750 in discovery-related sanctions against Citi, and, finally, (4) granted a protective discovery order in favor of Citi and, in connection with that motion, awarded $400 in sanctions against Garcia's counsel. We also find these claims without merit and affirm the judgment in all respects.

II. DISCUSSION

A. *Summary Judgment Was Properly Granted in Favor of Citi*

1. Standard of Review on Summary Judgment

Summary judgment is properly granted if there is no triable issue of material fact and the issues raised by the pleadings may be decided as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843; Code Civ. Proc., § 437c, subd. (c).) A moving defendant is entitled to summary judgment if it shows, for example, that one or more elements of the plaintiff's causes of action cannot be established. (*Aguilar v. Atlantic Richfield Co.*, *supra*, at p. 849.) If the defendant meets this burden, the burden shifts to the plaintiff to show there is a triable issue of material fact. (*Ibid.*)

On appeal, "[w]e independently determine whether the parties have met their respective burdens and whether no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law." (*Kasparian v. AvalonBay Communities, Inc.* (2007) 156 Cal.App.4th 11, 18, fn. omitted.) We are not bound by the trial court's ruling or its rationale. (*Mateel Environmental Justice Foundation v. Edmund A. Gray*

Co. (2003) 115 Cal.App.4th 8, 17.) We affirm if the summary judgment was properly granted on any theory. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

2. Undisputed Facts

In 2011, Garcia owned a home in Victorville (the property) that his father built in the 1950's. In April 2007, Garcia obtained a $150,000 loan from Citi, secured by a first-position deed of trust. By 2009, Garcia fell behind in his payments and was in default on the loan. In 2010, Citi instituted nonjudicial foreclosure proceedings. A notice of default was recorded on March 25, 2010, followed by a notice of trustee's sale, recorded on June 28, 2010, setting the date of the foreclosure sale for July 19, 2010.

The foreclosure sale did not take place on July 19, 2010. In a letter dated January 19, 2011, Citi notified Garcia that he had been approved to enter into a trial loan modification plan. The plan required Garcia to timely make three payments to Citi in the amount of $777.79 on February 1, 2011, March 1, 2011, and April 1, 2011. If all three payments were timely made, the loan would be permanently modified and the pending foreclosure sale, postponed from July 19, 2010, would not occur.

Garcia made the February 1, 2011, payment to Citi, but he did not make the second or third trial loan modification payments that were due on March 1 and April 1, 2011. Garcia lost the property in an April 1, 2011, foreclosure sale. The buyer, Richard Hebb of Hillside Land Corp., paid $22,572.01 for the property in exchange for a trustee's deed. Garcia's unpaid loan balance was $168,933.35 at the time of the foreclosure sale.

Before the April 1, 2011, foreclosure sale, Citi transferred the note and deed of trust. On or about February 11, 2011, Citi sent a letter to Garcia via first class mail advising him that (1) Citi was transferring his loan to Vericrest, effective March 1, 2011, (2) Citi would stop accepting payments on the loan after February 28, 2011, (3) the "new servicer" of the loan, Vericrest, would begin accepting the payments on March 1, 2011, (4) the transfer did not affect any pending bankruptcy or foreclosure proceedings, and (5) if his payments were being automatically withdrawn from his checking account, then that service would be "cancelled, as of February 28, 2011."

Thus, effective March 1, 2011, Vericrest became the new "servicer" of Garcia's loan on behalf of the new owner of the note and the deed of trust, LSF7 Bermuda NPL VI Trust. Garcia did not arrange to have Vericrest automatically deduct his March 1, 2011, or April 1, 2011, payments from his checking account, and he did not otherwise make the payments to Vericrest or to Citi. Accordingly, the property was sold at the April 1, 2011, foreclosure sale.

3. Citi's Motion and the Court's Ruling

As noted, the TAC alleged three causes of action against Citi: (1) wrongful foreclosure, (2) breach of contract, and (3) breach of the implied covenant of good faith and fair dealing. Each cause of action was based on Citi's failure to withdraw the March 1, 2011, trial loan modification payment from Garcia's checking account, pursuant to Garcia's January 2011 authorization allowing Citi to automatically withdraw all three trial loan modification payments from his checking account.

Citi moved for summary judgment on the ground Garcia could not establish at least one element of each of his three causes of action. Citi argued all three causes of action were "implicitly integrated" with the April 1, 2011, foreclosure sale, and Garcia could not prove an essential element of each claim because it was undisputed that he did not tender the *full* amount due on his mortgage loan, at or before the foreclosure sale. Citi also argued Garcia's breach of contract and implied covenant claims failed because Garcia did not make his March 1, 2011, trial loan modification payment. Relying on *Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 526, the court granted the motion on the ground Garcia could not show he was damaged by the foreclosure because he did not tender the full amount due on his mortgage loan, at or before the time of the foreclosure sale.

4. Analysis

Garcia claims Citi's motion should have been denied because he did, in fact, tender his March 1, 2011, payment to Citi when, in January 2011, he authorized Citi, through Western Union, to withdraw all three trial loan modification payments from his Bank of America checking account. He argues Citi "voluntarily disable[d]" itself from withdrawing his March 1 payment when, effective February 28, 2011, Citi transferred the loan to a new owner and Vericrest became the new loan servicer responsible for collecting the payments due on the loan and otherwise administering the loan. Hence, he argues his property was wrongfully foreclosed upon and sold at the April 1, 2011, foreclosure sale, and Citi is liable to him in damages for the wrongful foreclosure and

sale, because the sale was precipitated by Citi's breach of contract and breach of the implied covenant when Citi refused to automatically withdraw his March 1 payment, thus placing him in default of the trial loan modification plan and allowing the foreclosure sale to proceed.

We conclude the motion was properly granted, not because Garcia did not tender the full amount of his mortgage debt, but because Garcia could not show Citi had an obligation, in contract or in tort, to automatically deduct or otherwise accept his March 1 trial loan modification payment.

We begin with Garcia's cause of action for breach of contract. "'A cause of action for breach of contract requires proof of the following elements: (1) existence of the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff as a result of the breach.' [Citation.]" (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 402.)

The missing element is the second: Garcia could not show he performed or was excused from performing his obligation to make the March 1, 2011, payment under the trial loan modification agreement. The undisputed evidence shows Citi and Garcia entered into a trial loan modification agreement when Garcia made his February 1, 2011, trial loan modification payment to Citi. By entering into the agreement, Citi, as the holder of Garcia's note and the beneficiary under the deed of trust, agreed to permanently modify Garcia's mortgage loan provided he timely made three payments to Citi of $777.79 on February 1, March 1, and April 1, 2011.

But nothing in the trial loan modification agreement, which was memorialized in Citi's January 19, 2011, letter to Garcia, prohibited Citi from transferring the loan, or the note and deed of trust, to a new beneficiary. Nor did the agreement prohibit Citi from assigning its right to collect payments, or "service" and otherwise administer the loan, to another entity, such as Vericrest. Further, the deed of trust provided that the loan could be transferred to a new owner, upon notice to the borrower, and that the servicer of the loan could also change.

In its letter dated February 11, 2011, Citi notified Garcia that it was transferring the loan effective March 1, 2011; that Vericrest would be the new servicer of the loan; that Citi would not accept payments on the loan after February 28, 2011; all payments after February 28 had to be made to Vericrest; and if his payments were being automatically withdrawn, the service would be cancelled as of February 28, 2011.

Garcia did not make the March 1 payment. And by failing to make the March 1 payment, Garcia breached the trial loan modification agreement he made with Citi on February 1; thus, Garcia could not prove he performed his obligation under the trial loan modification agreement to make the March 1 payment, a necessary element of his breach of contract claim against Citi.

For the same reason, Garcia could not prove Citi breached the covenant of good faith and fair dealing, implied by law in the trial loan modification agreement and deed of trust. All contracts impose a covenant or duty of good faith and fair dealing, but the covenant "does not trump an agreement's *express* language [citation]. '"The general rule

[regarding the covenant of good faith] is plainly subject to the exception that the parties may, by express provisions of the contract, grant the right to engage in the very acts and conduct which would otherwise have been forbidden by an implied covenant of good faith and fair dealing.'" [Citation.]" (*Steiner v. Thexton* (2010) 48 Cal.4th 411, 419-420.) Because the trial loan modification agreement did not limit Citi's right, under the deed of trust, to transfer the loan and change the servicer, Garcia could not prove that Citi breached the implied covenant of good faith by failing to accept the March 1 payment.

Lastly, undisputed evidence shows Garcia could not establish his tort claim against Citi for money damages based on the alleged wrongful foreclosure and sale of his property. "The basic elements of a tort cause of action for wrongful foreclosure track the elements of an equitable cause of action to set aside a foreclosure sale. They are: '(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale . . . was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering.' [Citation.]" (*Miles v. Deutsche Bank National Trust Co., supra,* 236 Cal.App.4th at p. 408.)

In his claim for wrongful foreclosure against Citi, Garcia alleged the foreclosure sale was unlawful *only* because Citi did not automatically withdraw his March 1, 2011, payment from his checking account. For the reasons discussed, however, Citi was not obligated to automatically withdraw or accept the March 1 payment from Garcia, after

Citi notified Garcia in its February 11, 2011, letter that it was transferring his note and deed of trust effective March 1, 2011; that all payments after February 28, 2011, had to be made to Vericrest; and that any arrangement to have the loan payments automatically withdrawn would be cancelled effective February 28, 2011. Garcia did not even adduce evidence that he had sufficient funds to make the March 1 payment. Thus, Garcia could not prove the first element of his tort claim against Citi for wrongful foreclosure: an unlawful foreclosure sale. (*Miles v. Deutsche Bank National Trust Co., supra*, 236 Cal.App.4th at p. 408.)

Lastly, we disagree with Citi's argument and the trial court's conclusion that Garcia could not prove an essential element of his wrongful foreclosure, breach of contract, or implied covenant claims because he did not tender the *full amount* due on his mortgage loan. To be sure, it is the general rule that "[a] full tender must be made *to set aside a foreclosure sale*, based on equitable principles. [Citations.]" (*Stebley v. Litton Loan Servicing, LLP*, *supra*, 202 Cal.App.4th at p. 526, some italics added, some italics omitted.) "The rationale behind the rule is that if [the borrower] could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the [borrower]." (*FPCI Re-HAB 01 v. E & G Investments, Ltd.* (1989) 207 Cal.App.3d 1018, 1022; *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109 [full tender must be alleged "in order to maintain any cause of action for irregularity in the sale procedure"]; but see *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 113 [no tender required when it would be inequitable to impose the

condition]; see also *Fonteno v. Wells Fargo Bank, N.A.* (2014) 228 Cal.App.4th 1358, 1372-1374 [discussing equitable exceptions to tender rule].)

But here, Garcia did not allege any irregularities in the foreclosure sale *procedure*, and he is not seeking to set aside the foreclosure sale. Instead, he is seeking money damages from Citi based on its failure to accept his March 1 payment, which he claims resulted in the "wrongful foreclosure" and sale of his property on April 1, 2011. (See *Miles v. Deutsche Bank National Trust Co.*, *supra*, 236 Cal.App.4th at p. 409 [in tort claim for wrongful foreclosure, plaintiff is not limited to contractual damages but may recover """"all consequential damages occasioned by the wrongful [foreclosure] . . . ."""""].) As we have explained, Citi had no obligation to accept the March 1 payment because it gave Garcia advance notice that it was transferring his loan effective March 1; the March 1 payment had to be made to Vericrest; and if the payments were being automatically withdrawn, that service was being cancelled effective February 28. Thus, Citi demonstrated that Garcia could not show that the foreclosure sale was wrongful based on Citi's refusal to automatically withdraw his March 1 payment.

B. *Citi's General Demurrer to the Fourth Through Tenth Causes of Action of the SAC Was Properly Sustained, Without Leave to Amend*

Garcia also claims the trial court erroneously sustained Citi's general demurrer to the fourth through tenth causes of action of his SAC, without leave to amend. Each of these seven causes of action sounded in either intentional misrepresentation, fraudulent

concealment, or negligent misrepresentation. We conclude the demurrer was properly sustained, without leave to amend, to each of these causes of action.

1. Relevant Background

On April 8, 2011, Garcia filed his original complaint in the present action, naming Citi and other defendants. In February 2012, he filed his SAC. Citi demurred to the SAC on the ground it failed to state a cause of action and moved to strike its allegations and prayers for punitive damages. In June 2012, the court sustained, without leave to amend, Citi's demurrer to the fourth through tenth causes of action of the SAC, alleging claims based on intentional misrepresentation, fraudulent concealment, and negligent misrepresentation. The court sustained, with leave to amend, Citi's general demurrer to the first cause of action for wrongful foreclosure, and overruled the demurrer to the second and third causes of action for breach of contract and breach of the covenant of good faith. The court granted, without leave to amend, Citi's motion to strike *all* of the punitive damages allegations of the SAC, including those alleged in the first through third causes of action.

2. Standard of Review

A general demurrer tests the legal sufficiency of the allegations of a complaint by claiming its factual allegations, even if true, do not state a cause of action. (*McKenney v. Purepac Pharmaceutical Co.* (2008) 167 Cal.App.4th 72, 77.) The standard of review is de novo; we independently determine whether the complaint states a cause of action under any legal theory. (*Estate of Dito* (2011) 198 Cal.App.4th 791, 800.) We treat the

demurrer as admitting the truth of all properly pleaded material facts alleged in the complaint, and we also consider matters that may be judicially noticed, but we disregard any asserted conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) When the demurrer is sustained without leave to amend, we independently determine whether there is a reasonable possibility that the complaint can be amended to state a cause of action. (*Ibid*.)

3. Analysis

The fourth through tenth causes of action alleged in the SAC were for "fraudulent concealment," in violation of Civil Code sections 1572, 1709, and 1710 (fourth, seventh, and ninth), "intentional misrepresentation," in violation of Civil Code sections 1572, 1709, and 1710 (fifth, eighth, and tenth), and "negligent misrepresentation," in violation of Civil Code section 1572 (sixth).[2] As Garcia concedes, the claims are repetitive and essentially allege three causes of action for (1) intentional misrepresentation (fraud or deceit), (2) fraudulent concealment (a species of fraud or deceit), and (3) negligent misrepresentation.

[2] For purposes of determining whether parties have freely consented to enter into the contract, Civil Code section 1572 defines "actual fraud" as including, among other acts, "[t]he suggestion, as a fact, of that which is not true, by one who does not believe it to be true," and "[a] promise made without any intention of performing it." Under Civil Code section 1709, a person who "willfully deceives another with intent to induce him to alter his position to his injury or risk," is liable in damages to the person deceived, and Civil Code section 1710 defines "deceit," for purposes of Civil Code section 1709, in substantially the same terms as fraud is defined in Civil Code section 1572.

To state a tort claim for fraud or deceit based on an intentional misrepresentation, a plaintiff must allege (1) a misrepresentation, (2) knowledge of its falsity, (3) intent to defraud, (4) justifiable reliance, and (5) resulting damage. (*Jackson v. Fischer* (N.D. Cal. 2013) 931 F.Supp.2d 1049, 1067; *Charpentier v. Los Angeles Rams Football Co.* (1999) 75 Cal.App.4th 301, 312.) Further, fraud must be pled with specificity; general and conclusory allegations do not suffice. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645; *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73-74.)

"Concealment is a species of fraud or deceit. [Citations.] '[T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.' [Citations.]" (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 868.)

"The elements of negligent misrepresentation are '(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.' [Citation.]" (*National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.* (2009) 171

Cal.App.4th 35, 50.) The causal elements of negligent misrepresentation, particularly the element of justifiable reliance, must be specifically pled. (*Ibid.*)

The key allegation underlying the fourth through tenth causes of action of the SAC was that Citi misrepresented to Garcia that it would automatically withdraw all three trial loan modification payments from his checking account, including the payment due on March 1, and its failure to do so caused Garcia to default on the trial loan modification plan and lose his property at the April 1, 2011, foreclosure sale. But in the SAC, Garcia admitted that, on February 18, 2011, he received "correspondence" from Citi stating that Citi was "transferring" his loan "to Vericrest effective March 1, 2011." This admission was fatal to Garcia's fraud and misrepresentation claims and cannot be cured by amendment.

Because Garcia admitted in the SAC that he knew, in advance of March 1, 2011, that his loan was being transferred effective March 1, he could not have justifiably relied to his detriment on Citi's *prior* representation, made in January 2011, that it would automatically withdraw all three trial loan modification payments from his checking account. That representation was superseded by Citi's notice to Garcia that his loan was being transferred. Further, the SAC alleged no facts indicating that Citi's January 2011 representation was false when it was made. Thus, Garcia did not and could not allege a cause of action against Citi for intentional misrepresentation, fraudulent concealment, or negligent misrepresentation.

C. *The Punitive Damages Allegations Were Properly Stricken from the Breach of Contract, Implied Covenant, and Wrongful Foreclosure Claims in the SAC*

Garcia claims the court erroneously struck punitive and exemplary damages allegations and prayers from the SAC, without leave to amend. (Code Civ. Proc., § 436 [court may "[s]trike out any irrelevant, false, or improper matter inserted in any pleading"].) We review this claim de novo (*Kaiser Foundation Health Plan, Inc. v. Superior Court* (2012) 203 Cal.App.4th 696, 704) and find it without merit.

Because we have concluded that Citi's demurrer to the fourth through tenth causes of action alleged in the SAC was properly sustained without leave to amend, we confine our discussion to the punitive damages allegations contained in the first through third causes of action for (1) wrongful foreclosure, (2) breach of contract, and (3) breach of the implied covenant of good faith and fair dealing. As alleged in the SAC and the TAC, each of these causes of actions was based on Citi's alleged contractual obligation to automatically withdraw Garcia's March 1 payment from his checking account.

Ordinarily, punitive damages are not recoverable for breach of a contractual obligation (Civ. Code, § 3294, subd. (a); *Brewer v. Premier Golf Properties, LP* (2008) 168 Cal.App.4th 1243, 1251), and Garcia's contract-based claims present no exception.

"[T]o state a prima facie claim for punitive damages, a complaint must set forth the elements as stated in the general punitive damage statute, Civil Code section 3294. [Citation.] These statutory elements include allegations that the defendant has been guilty of oppression, fraud or malice. (Civ. Code, § 3294, subd. (a).) '"Malice"' is

defined in the statute as conduct, 'intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' (Civ. Code, § 3294, subd. (c)(1) . . . .) '"Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.' (Civ. Code, § 3294, subd. (c)(2).) '"Fraud"' is 'an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.' (Civ. Code, § 3294, subd. (c)(3).)" (*Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63.)

The punitive damages allegations and prayers were properly stricken from the first, second, and third causes of action, because nothing in the SAC indicated that Citi's failure to deduct Garcia's March 1 payment rose to the level of malice, oppression, or fraud as those terms are defined in Civil Code section 3294. To the contrary, Garcia admitted in the SAC that, on February 18, 2011, he received "correspondence" from Citi stating that Citi was "transferring" his loan "to Vericrest effective March 1, 2011." This shows Citi gave Garcia advance notice that it was transferring his loan effective March 1, 2011, and belies Garcia's assertion that Citi acted with malice, oppression, and fraud in failing to deduct the March 1 payment.

D. *The Trial Court Properly Denied Garcia's Request for $2,750 in Monetary Sanctions Regarding Citi's First Motion for a Protective Discovery Order*

Garcia claims the trial court abused its discretion in denying his request for $2,750 in monetary sanctions against Citi or its counsel. We find no abuse of discretion. Garcia sought the sanctions for opposing and appearing at a hearing on Citi's first motion for a protective discovery order, in which Citi sought to be excused from responding to 1,000 written discovery requests propounded by Garcia.

1. Relevant Background

In May 2012, Citi moved for a protective order excusing it from responding to 500 special interrogatories and 500 requests for production of documents propounded by Garcia. In its motion, Citi sought $2,790 in sanctions against Garcia and his counsel for having to bring the motion. Garcia opposed the motion, and sought $2,750 in sanctions against Citi or its counsel for having to oppose the motion. Later, in May 2012, Citi and Garcia agreed to continue the hearing on the motion pending the court's ruling on Citi's demurrer to the SAC and motion to strike its punitive damages allegations.[3]

The 1,000 discovery requests sought to "probe Citi's relationship" with another defendant in the case, Mortgage Electronic Registration System (MERS). In June 2012,

[3] Vericrest sought a similar protective order, and Garcia sought $6,525 in monetary sanctions against Vericrest for having to oppose Vericrest's motion for a protective order. We point this out because, in his opening brief, Garcia at one point confuses the $2,750 in sanctions he sought against Citi with the $6,525 in sanctions he sought against Vericrest. Vericrest withdrew its motion for a protective order and request for sanctions before the matter was heard.

the court sustained MERS's general demurrer to the SAC, without leave to amend, and ordered the SAC dismissed against MERS. In September 2012, Garcia withdrew the 1,000 discovery requests after the court denied his motion for reconsideration of its ruling dismissing MERS.

At a November 27, 2012, hearing, the court deemed Citi's motion for a protective order moot and denied both parties' requests for sanctions. In pressing for sanctions, Citi argued that the 1,000 discovery requests were inappropriately propounded, and Citi had no choice but to prepare the motion for a protective order, in May 2012, because counsel for Garcia was refusing to limit the discovery requests. Counsel for Garcia argued Citi should have promptly withdrawn its motion for a protective order after he "timely and in good faith" withdrew the 1,000 discovery requests in September 2012.

2. Analysis

We review the denial of Garcia's request for sanctions against Citi for an abuse of discretion (*St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 772) and resolve all evidentiary conflicts favorable to the court's ruling (*Ellis v. Toshiba America Information Systems, Inc.* (2013) 218 Cal.App.4th 853, 878). We reverse only if the trial court's action was "'"'arbitrary, capricious, or whimsical.'"' [Citations.]" (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 401.)

Misuses of the discovery process include "[m]aking or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery." (Code Civ. Proc., § 2023.010, subd. (h).) If a party, person, or attorney unsuccessfully makes a

motion for a protective order to limit responses to special interrogatories or requests for production, "[t]he court shall impose a monetary sanction" against that party, person, or attorney, "unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code Civ. Proc., §§ 2030.090, subd. (d) [special interrogatories], 2031.060, subd. (h) [requests for production], 2023.030, subd. (a) [monetary sanctions].)

Substantial evidence shows that Citi acted with "substantial justification," both in filing its motion for a protective order in May 2012, and in proceeding to the November 2012 hearing for the sole purpose of seeking monetary sanctions against Garcia and his counsel for its attorney fees and costs incurred in preparing the motion. Before Citi filed the motion on May 9, 2012, its counsel wrote to Garcia on April 23, and spoke with him on the telephone on May 2, in an attempt to limit the discovery requests to relevant information, but counsel for Garcia refused to limit *any* of the requests, and many of the requests sought information and materials that were outside the scope of permissible discovery. (Code Civ. Proc., § 2023.010, subd. (a).) For example, the discovery asked Citi how many shares were issued when it was first incorporated and to identify all of its shareholders and how many shares each shareholder owned. Other special interrogatories and requests for production sought similarly irrelevant information and materials.

Garcia suggests that the 1,000 discovery requests caused no harm to Citi because his counsel withdrew all of the requests before the November 2012 hearing. But given Citi's demonstrated need to prepare and file the motion when it did so in May 2012 and

the reasonableness of Citi's request for $2,790 in monetary sanctions for preparing and filing the motion, the court by no means abused its discretion in denying Garcia's "counter" motion for $2,750 in monetary sanctions against Citi for Garcia's fees and costs incurred in opposing the motion and appearing at the hearing.

E. *The Trial Court Properly Granted Citi's Second Motion for a Protective Discovery Order and Request for Monetary Sanctions*

In July 2013, the month after it filed an answer to the TAC, Citi filed a second motion for a protective order excusing it from responding to Garcia's third set of special interrogatories and requests for production of documents, and sought $3,640 in sanctions against Garcia and his counsel for its attorney fees and costs incurred in preparing and filing the motion. On September 11, 2013, the court granted the motion, with the exception of three of the production requests, and awarded Citi $400 in sanctions against Garcia's counsel.

Garcia claims the court abused its discretion in granting Citi's second motion for a protective order and in awarding Citi $400 in sanctions against his counsel. We review both rulings under the abuse of discretion standard, and find no abuse of discretion in either ruling. (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1186 [trial court is vested with wide discretion in granting or denying discovery]; *Doe v. United States Swimming, Inc.* (2011) 200 Cal.App.4th 1424, 1435 [ruling on monetary discovery sanction reviewed for abuse of discretion].)

The discovery sought extensive information and documents ostensibly unrelated to Garcia's mortgage loan or property, or to the claims alleged in Garcia's TAC. For example, one interrogatory demanded that Citi identify the number of trial loan modifications it approved in 2008 through 2012 in 24 California zip codes. Garcia has not explained how any of the discovery was reasonably calculated to lead to the discovery of admissible evidence. (Code Civ. Proc., § 2017.020 [protective order may issue to limit discovery unlikely to lead to discovery of admissible evidence].) Second, the $400 sanctions award was reasonable, given the declaration of Citi's counsel that Citi expended $3,640 in attorney fees in preparing the motion, after attempting, unsuccessfully, to resolve the matter with counsel for Garcia. (*Parker v. Wolters Kluwer United States, Inc.* (2007) 149 Cal.App.4th 285, 294.)

III. DISPOSITION

The judgment is affirmed in all respects. Citi shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.